80-1806

No. ——

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

DAVID R. HARRIS, Superintendent, Greenhaven Correctional Facility, ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Petitioners,

against

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ALAN D. MARRUS
CHARLES L. BACH, JR.
Assistant District Attorneys
Of Counsel

Questions Presented

1. Must a federal court on *habeas* review of a state murder conviction, first determine whether jointly represented defendants had waived their right to contest such joint representation as ineffective before granting petitions for writs of habeas corpus on the ground that said defendants suffered actual prejudice by virtue of the joint representation?

2. Must a federal court, in the interest of comity on *habeas* review, afford the state court the opportunity to hold a fact-finding hearing to determine whether jointly represented criminal defendants had consented to multiple representation where the state trial judge had affirmed that he made such an inquiry, off-the-record and before trial, of both defense counsel and of his clients, who, following their convictions, failed to pursue an available, collateral state procedure which would have determined the extent of such an inquiry?

3. Can a federal *habeas* court completely disregard the sworn allegations of a state trial judge that the latter conducted a pretrial inquiry of the attorney who had been jointly retained by three criminal defendants, and that during said inquiry, which occurred in the presence of the defendants, the defense attorney informed the state court that (a) he had advised his clients of the judge's concern that they consider whether conflicting interests could arise at trial, (b) he further advised his clients that the judge would afford them the opportunity to retain separate counsel or request appointed counsel if they so desired and (c) his clients reaffirmed their desire to him and to the trial judge to proceed with their retained attorney?

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No. ——

IN THE

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October Term, 1981

DAVID R. HARRIS, Superintendent, Greenhaven Correctional Facility, ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Petitioners,

against

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, David R. Harris, the Superintendent of Greenhaven Correctional Facility *et ano.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 11, 1981.

Opinion Below

The order of the Court of Appeals affirming the judgment of the District Court for the Southern District of New York appears in the Appendix hereto. The opinion of the District Court, not yet reported, also appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on March 11, 1981. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Respondents were indicted by the Grand Jury of Bronx County, New York, in February, 1972, for, *inter alia,* acting in concert to commit intentional murder. Respondents jointly retained an attorney, Stanley Siegel, Esq., and in January, 1974, the case was moved to trial. Prior to jury selection, an untranscribed discussion was had among the trial judge, the defense attorney and the prosecutor.

According to the sworn statements of the prosecutor and the trial judge, which were submitted to the District Court in response to respondents' petitions for federal writs of habeas corpus, the judge asked defense counsel whether he had discerned a potential conflict of interest amongst his clients. Mr. Siegel assured the court that no conflict had arisen, or would likely arise during the trial. The trial judge nevertheless directed defense counsel to advise his clients of the court's concern that a conflict of interest might arise during the trial and ask his clients if they wanted the opportunity to retain separate counsel or request that separate counsel be appointed for them.

In a second affidavit submitted to the District Court, the trial judge asserted that he subsequently took the bench and asked defense counsel, in the presence of respondents,

whether he had complied with the court's directive. After counsel replied that he had advised his clients of the court's concern, all three respondents were separately questioned by the trial judge, and they informed the court of their desire to proceed to trial with joint counsel (A. 10-11, 26-27).*

During the trial, eight witnesses testified for the prosecution and six eyewitnesses described the beating which respondents inflicted upon 16-year-old William Travieso. All three respondents were observed carrying knives, and punching and kicking their victim, whose death was caused by a stab wound to his chest. Respondent Bonilla, the sole witness for the defense, testified that the decedent started the fight and that neither he nor his two cohorts used knives during the melee. Respondents were convicted of intentional murder and criminal possession of a weapon after their jury trial in state court (T. 27-43, 97-102, 143-47, 162-63, 210-11, 232-33, 250-51, 298-304).

The judgments of conviction of respondents Laureano and Bermudez were affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York, First Department, on December 3, 1974. The judgment of respondent Bonilla's conviction was affirmed by that court on February 15, 1977. All three defendants unsuccessfully argued that they were denied the effective assistance of counsel at trial by virtue of their joint repre-

* Numbers prefaced by the letter "A" refer to the Joint Appendix submitted by petitioners to the Second Circuit Court of Appeals; those prefaced "T" refer to the transcript of the state trial conducted in New York State Supreme Court, Bronx County, from January 24 to February 5, 1974.

sentation by the attorney whom they had retained. Leave to appeal the judgments of conviction of Laureano and Bermurdez to the New York Court of Appeals was denied by former Chief Judge Charles Breitel on January 22, 1975, while Bonilla's application for leave to appeal to that Court was denied by Chief Judge Breitel on April 14, 1977.

Respondents thereafter petitioned for writs of habeas corpus in the Federal District Court for the Southern District of New York. In support of their petition, respondents submitted the affidavit of their trial attorney who asserted that, in an untranscribed conference, he requested the trial judge to appoint separate counsel before trial commenced and the judge refused his request. In separate affidavits submitted to the District Court, the trial judge and prosecutor controverted that allegation and provided the account of the inquiry described above.

Notwithstanding the existence of these disputed facts never before presented to the state courts, the District Court disregarded the allegations and ruled that respondents had exhausted state remedies and were actually prejudiced by virtue of the joint representation afforded them. The District Court granted respondents' petitions for writs of habeas corpus without ordering a hearing on the disputed facts. On November 26, 1979, this order was affirmed without opinion by the Court of Appeals for the Second Circuit.

Petitioner sought a petition for a writ of certiorari to review the November 26, 1979 order of the Court of Appeals and, on May 27, 1980, this Court granted certiorari. On that date, this Court vacated the order of the Court of Appeals

for the Second Circuit and remanded the matter to the Court of Appeals to reconsider its decision in light of this Court's opinion in *Cuyler* v. *Sullivan,* 446 U.S. 335 (1980). On March 11, 1981, the Court of Appeals again affirmed the order of the District Court which had granted respondents writs of habeas corpus.

Reasons for Granting the Writ

This Court should grant the instant petition to resolve several important questions which remain unanswered concerning both the scope of federal *habeas* review and the recurring issue of multiple representation of criminal defendants.

In *Cuyler* v. *Sullivan, supra* at 346-47, this Court recognized that the Sixth Amendment imposes no duty upon a state trial judge to conduct an inquiry, *sua sponte,* whenever two or more criminal defendants are represented by one attorney. Notwithstanding that ruling, the Court of Appeals for the Second Circuit has now set aside a state murder conviction even though the trial judge affirmed that he had, *sua sponte,* conducted an inquiry of both counsel and of his clients concerning the potential for conflicts of interest to arise and that all parties had reasserted their desire to proceed to trial without separate counsel. By this holding, the Court of Appeals has created an apparent conflict with its own prior decisions and with the decisions of other circuit courts which recognize that criminal defendants can consent to be jointly represented, thereby waiving their right to argue on appeal that the multiple representation failed to provide them with the effective assistance of

counsel. *See Zuck* v. *State of Alabama,* 588 F.2d 436, 440 (5th Cir. 1979); *United States* v. *Waldman,* 579 F.2d 649, 652 (1st Cir. 1978); *Kaplan* v. *Bombard,* 573 F.2d 708, 714-15 (2d Cir. 1978); *United States* v. *Eaglin,* 571 F.2d 1069, 1086 (9th Cir. 1977); *United States* v. *Lawriw,* 568 F.2d 98 (8th Cir. 1977); *United States* v. *LaRiche,* 549 F.2d 1088 (6th Cir. 1977), *cert. denied,* 430 U.S. 987 (1977).

Petitioners urge this Court to review this case so that this murder conviction, and other state convictions, will not be so readily discarded by the federal courts. Despite the existence of sworn factual allegations made by all parties to the state trial, despite the availability of a collateral state procedure which is traditionally used to ascertain the merits of an ineffectiveness of counsel claim [*See Patterson* v. *Leeke,* 556 F.2d 1168 (4th Cir. 1977); *People* v. *Brown,* 45 N.Y.2d 852 (1978); New York Criminal Procedure Law Section 440.10], the court below rushed to a judgment which completely disregarded the traditional notions of comity existent between the federal and state system. More importantly, the decision of the court below, epitomizing, as it does, an improvident exercise of federal *habeas* jurisdiction, is incompatible with several recent decisions of this Court. *See Sumner* v. *Mata,* —— U.S. ——, 101 S. Ct. 764, 770-72 (1981); *Wainwright* v. *Sykes,* 433 U.S. 72, 89-91 (1977); *Stone* v. *Powell,* 428 U.S. 465 (1976). To be sure, the opinions of both the circuit court and of the district judge are prime examples of the dangers inherent in the exercise of federal *habeas* jurisdiction to decide the legal issues of a case without the benefit of the resolution of key factual issues. *See Townsend* v. *Sain,* 372 U.S. 293, 312-14 (1963).

Moreover, the opinion of the court below clearly shows that that court engaged in a great deal of judicial speculation when it found that, by reason of their joint representation, actual prejudice was caused to these respondents. Instead, the trial record reveals a prosecution of three friends who voluntarily chose not to implicate one another at trial but to present a united front against the prosecution's case. Nowhere in the opinion of the court below is there a citation to a single point in the state trial where the attorney who was jointly retained by respondents *"actively represented conflicting interests."* *Cuyler* v. *Sullivan, supra* at 350. A federal court simply should not cast aside a conviction by engaging in conjecture engendered by hindsight, particularly where, as here, the real people involved in the state trial freely chose to present a joint defense. Where criminal accomplices have voluntarily chosen to "stick together" throughout a state trial, out of loyalty, or for any other motive, they should not be heard to complain in federal court that their own trial strategy violated their constitutional rights.

In sum, this Court can announce to state trial judges that jointly represented criminal defendants who, prior to trial, have reasserted their desire to proceed with one attorney, forever waive their right to argue that the attorney they chose to jointly represent them failed to afford them effective representation because conflicts of interest arose at trial. Petitioners ask this Court to grant the instant petition, to announce such a rule, and to correct a decision of the circuit court which is clearly erroneous.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

MARIO MEROLA
District Attorney
Bronx County
Attorney for Petitioners

ALAN D. MARRUS
CHARLES L. BACH, JR.
Assistant District Attorneys
Of Counsel

April 1981

APPENDIX A

Order of the United States Court of Appeals for the Second Circuit

Order of the United States Court of Appeals for the Second Circuit

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of March, one thousand nine hundred and eighty-one.

Present:

Hon. WILLIAM H. MULLIGAN
Hon. THOMAS J. MESKILL
Hon. AMALYA L. KEARSE
Circuit Judges.

79-2121

UNITED STATES OF AMERICA *ex rel.* FERNANDO BERMUDEZ,

Petitioner-Appellee,

against

LEON J. VINCENT, Warden, Greenhaven Correctional Facility, Stormville, New York,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This matter was originally before this court on appeal by the State of New York from an order of the District Court for the Southern District of New York, Lasker, J., granting the appellee's petition for habeas corpus. No. 77 Civ. 2048 (S.D.N.Y. June 27, 1979). We affirmed by summary order. 614 F.2d 1285 (2d Cir. 1979). The Supreme Court, however, subsequently granted certiorari and remanded the case to this court for reconsideration in light of *Cuyler* v. *Sullivan,* 446 U.S. 335 (1980). *Harris* v. *Bermudez,* 446 U.S. 962 (1980). Upon reconsideration, therefore, we now hold that the findings of the district court, as set out in the district court opinion, *supra,* and the report and recommendation of Magistrate Nina Gershon, No. 77 Civ. 2048 (S.D.N.Y. April 13, 1979), which was fully adopted by the district court, comply with the standard as enunciated in *Cuyler* v. *Sullivan, supra.* We therefore affirm the order of the district court granting the petition for habeas corpus.

In *Cuyler, supra,* the Court set out a two prong test for cases in which a petitioner asserts a Sixth Amendment claim of ineffective assistance of counsel based upon a conflict of interest arising from multiple representation. First, the Court held that it was not incumbent upon the trial judge to raise the issue in the first instance. If the defendant did raise the issue but the judge failed to afford the defendant an opportunity to demonstrate a conflict of interest, such a conflict may be presumed. *Cuyler* v. *Sullivan, supra,* 446 U.S. at 348. Second, if the defendant failed to raise an objection at trial, he must subsequently show that

an actual, not possible conflict of interest adversely affected his lawyer's performance. *Id.*

On the facts of the present case, this court need not determine whether or not it was the petitioner who raised the conflict of interest issue at the trial. It is apparent that the trial judge knew of the conflict. In any event, the detailed findings set forth in the magistrate's report and recommendation fully support a finding that there existed an *actual* conflict of interest in the present case. The only available defense to the prosecution where all three defendants were represented by the same lawyer was that perhaps none of the three stabbed the victim, but rather, the assailant was a member of the victim's family. There was no possibility for one defendant to attempt to disassociate himself from the others. Such a defense was no defense at all.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ William H. Mulligan
William H. Mulligan

/s/ Thomas J. Meskill
Thomas J. Meskill

/s/ Amalya L. Kearse
Amalya L. Kearse
Circuit Judges

APPENDIX B

Opinion of the United States District Court for the Southern District of New York

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 2048 (MEL)

UNITED STATES OF AMERICA *ex rel.* FERNANDO BERMUDEZ,
Petitioner,

against

LEON J. VINCENT, Warden, Green Haven Correctional Facility, Stormville, New York,
Respondent.

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78 Civ. 1023 (MEL)

JOSE LAUREANO,
Petitioner,

against

SUPERINTENDENT, Auburn Correctional Facility and DEPARTMENT OF CORRECTIONAL SERVICES,
Respondents.

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79 Civ. 1265 (MEL)

JOSE BONILLA,
Petitioner,

against

DAVID HARRIS, Superintendent, Greenhaven Correctional Facility,
Respondent.

Appearances:

PRISONERS' LEGAL SERVICES OF NEW YORK
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DIANA BUDZANOSKI, Esq.

ROBERT ABRAMS, Esq.
Attorney General of the State of New York
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Attorney for Respondents
Of Counsel: CLEMENT H. BERNE, Esq.
GERRY E. FEINBERG, Esq.

LASKER, D.J.

On March 12, 1974, Fernando Bermudez, Jose Laureano and Jose Bonilla were convicted in state court of acting in concert to murder William Travieso. No single defendant was charged with having been the actual killer. Their convictions were affirmed without opinion by the Appellate Division, and leave to appeal to the Court of Appeals was denied. All three now petition for writs of habeas corpus on the ground that their joint representation at trial denied them their Sixth Amendment right to effective assistance of counsel.

The petitions of Fernando Bermudez and Jose Laureano were referred for recommendation to Magistrate Gershon. Since the issues raised in Bonilla's petition, filed subsequently, are identical to those raised in the other two, the Magistrate's Report will be deemed to apply to it as well.

In a 35 page opinion, the Magistrate recommends that the writs be granted. Because we adopt her findings and conclusion, we make no attempt to duplicate her exhaustive and well-reasoned analysis but deal here only with the objections to her Report made by the State.

Exhaustion of State Court Remedies

It is not disputed that the same claim raised here was presented to the state courts. However, additional facts have been introduced as part of the habeas proceedings which the State contends materially alter the petitioners' argument and require that the cases be sent back to the state courts to afford those courts a "fair opportunity" to review the case in its allegedly new posture.

In their state court appeals no claim was made—at least by Bermudez or Laureano—that defense counsel had actually raised the issue of conflict of interest with the trial court. Instead, petitioners' claim was based solely on the trial judge's failure to exercise his affirmative obligation to inquire into the possibility of a conflict. However, in connection with the habeas proceedings in this court, petitioners have introduced an affidavit from their trial counsel who states that, in an off-the-record discussion, he advised the trial judge that a conflict of interest existed between his clients and requested that separate counsel be appointed. The affidavit further states that the judge dismissed coun-

sel's request as a "stalling tactic". (Affidavit of Stanley Siegel, April 27, 1977, ¶6) The State also supplemented its papers before this court by an affidavit from the trial judge who denies that the conversation described by defense counsel took place and states that he instructed counsel, in an unrecorded conversation, to ask his clients whether they wished to obtain separate counsel but was advised by counsel that they did not. (Affidavit of the Honorable William Kapelman, May 25, 1977, ¶¶ 4-7) Somewhat surprisingly, following the issuance of the Magistrate's Report, the State filed an additional affidavit in which the trial judge states that his conversation with defense counsel on the question of conflict of interest took place in the presence of petitioners and that, when questioned directly by the judge, all three men agreed that they wished to proceed with joint counsel. (Affidavit of April 23, 1979, ¶ 5)

The Magistrate concluded that the additional information offered in support of the petitioners' position did not "critically affect" the claim presented to the state courts. Moreover, she found that it would be futile to remand the case to the state since the appeal of Jose Bonilla, filed after those of the other two, referred to the conversation attested to by defense counsel, and his conviction was nevertheless affirmed. However, the State relies on *Holloway* v. *Arkansas,* 435 U.S. 475 (1978), to argue that the new facts significantly alter petitioner's position. In *Holloway,* the Supreme Court indicated that the degree of prejudice necessary to be established on appeal would vary depending on whether or not defense counsel had raised the issue of prejudice at trial, and held that, in a situation in which counsel repeatedly moved on the record for appointment of separate counsel, prejudice would be presumed.

Despite the State's contentions, we are not persuaded that there is a significant likelihood that the new evidence in the record would alter the disposition of the matter by the state courts. Defense counsel's representations are considerably undercut by the assertion of the trial judge also presented for the first time here that he himself rather than defense counsel raised the possibility of conflict with petitioners. Moreover, even if taken at full value, it is doubtful whether counsel's brief, off-the-record conversation brings this case within the ambit of *Holloway* in which defendants argued forcefully on at least three occasions that they should be granted separate counsel.[1] The concept of futility must be interpreted to encompass notions of economy and fairness. Thus unless new material creates at least a moderate likelihood of a different result, it is futile to send an action back to the state courts. Here, the likelihood of a different outcome is simply too speculative to justify the duplication of effort and the frustration to the parties which a remand to the state court would entail.

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1. Several other factors cast doubt on the likelihood that the state courts would reverse their position. One factor is the already heavy burden of proof met by the prosecution on appeal. Before the Appellate Division petitioners argued, and the State conceded, that the trial judge had not inquired into the possibility of conflict. This circumstance placed the burden on the prosecution of proving an absence of prejudice from joint representation, *United States* v. *DeBerry*, 487 F.2d 448, 453-54 n. 6 (2d Cir. 1973), a burden which the Appellate Division, which affirmed without opinion, apparently found was easily met. Thus the possibility of a different result is minimized by this prior conclusion that petitioners suffered no prejudice at trial. Finally, it is of some significance that Bonilla did refer in passing in his appellate proceedings to the conversation described by his trial lawyer. Although we agree with the State that the issue was placed before the Appellate Division too casually for us to conclude that that court did in fact rely on the proposition, this factor at least raises a question as to whether the state courts have not already passed on the significance of the new evidence.

Prejudice

The State contends that, far from being prejudiced by joint representation, petitioners were assured "a unified defense and thereby avoided incriminating each other." (Objections to the Magistrate's Report, p. 20) However, as the Magistrate pointed out, on the facts of this case a unified defense was no defense at all. It is undisputed that all three defendants were at the scene of the crime and that the only other people present were relatives of the deceased who had come to his rescue. In the face of this overwhelming evidence that one of the three defendants was responsible for the murder, to argue, as defense counsel did at trial, that all three men were innocent was indeed a hollow defense which inevitably redounded to the disadvantage of at least two, if not all three, defendants. See the Magistrate's Report, p. 23.

However, while the evidence rendered a unified defense extremely implausible, it left open the possibility that one or more of the defendants could successfully dissociate himself from the murder itself. The dead man was stabbed only once. Moreover, the testimony at trial varied as to the involvement of each defendant in the fight and as to which defendant—or defendants—was seen straddling Travieso with a knife. (Tr. 100, 106-07, 115-6, 143, 161) Although the State argues that "possible differing degrees of participation were without legal significance" (Objections, p. 20), this argument ignores the burden on the prosecution of establishing that all three defendants possessed the requisite intent to aid in the commission of a murder and that, by dissociating himself from the killing, or by shifting the blame onto another, a defendant might have convinced the

jury that he lacked such intent. Clearly, such a tactic was impossible so long as all three defendants were represented by the same attorney.[2]

Finally, we agree with the Magistrate's conclusion that the prejudice from joint representation extended to the plea bargaining stage.[3] Although petitioners were offered an "all or nothing" plea package by the prosecution, there is a significant likelihood that here, where the State lacked evidence as to which of the three defendants actually committed the stabbing, an independent lawyer might have worked out a special "deal" for his client in exchange for an agreement to testify. See *Holloway* v. *Arkansas, supra,* 435 U.S. at 490.

The Magistrate's Report is affirmed and incorporated in this decision. The petitions of Fernando Bermudez, Jose Laureano and Jose Bonilla are granted, and their convictions will be set aside unless they are granted a new trial within ninety days.

It is so ordered.

MORRIS E. LASKER

U.S.D.J.

Dated: New York, New York
June 27, 1979

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2. The State also contends that, in light of the new evidence concerning the trial judge's investigation into the possibility of a conflict of interest, the burden is on petitioners to establish actual prejudice rather than on the prosecution, as the Magistrate found, to prove an absence of prejudice. Since we agree with the Magistrate that petitioners have in any event established that prejudice did exist, it is unnecessary to decide this question.

3. This contention is raised only by Fernando Bermudez.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981
No. 80-1806

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DAVID R. HARRIS, Superintendent,
Greenhaven Correctional Facility,
ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO
and JOSE BONILLA,

Respondents.

----------x

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, FERNANDO BERMUDEZ, hereby moves this Honorable Court pursuant to Rule 53 for an order permitting him to file his Response to the Petition for a Writ of Certiorari and otherwise proceed in the Court in forma pauperis.

In support of this motion, Respondent relies upon his annexed affidavit, sworn on June , 1981.

Dated: New York, New York
June , 1981

FERNANDO BERMUDEZ
Pro Se
c/o CAROCCIO
224 E. 28th Street
New York, N.Y. 10016
Apt. 20H
226-5123

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981
No. 80-1806

----------x

DAVID R. HARRIS, Superintendent,
Greenhaven Correctional Facility,
ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO
and JOSE BONILLA,

Respondents.

----------x

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent FERNANDO BERMUDEZ, pro se most respectfully requests this Court to consider the arguments advanced in the briefs in opposition to the Petition for a Writ of Certiorari asserted by co-respondents JOSE LAUREANO and JOSE BONILLA and joins in their arguments and hereby requests this Court to consider those arguments his arguments without the necessity of further legal citations or independent brief.

Respectfully submitted,

FERNANDO BERMUDEZ Pro Se
c/o Caroccio
224 E. 28th Street
New York, New York 10016
Apr 20H
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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981
No. 80-1806

----------x

DAVID R. HARRIS, Superintendent,
Greenhaven Correctional Facility,
ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO
and JOSE BONILLA,

Respondents.

----------x

AFFIDAVIT IN SUPPORT OF MOTION OF FERNANDO BERMUDEZ TO PROCEED IN THE SUPREME COURT OF THE UNITED STATES IN FORMA PAUPERIS

I, FERNANDO BERMUDEZ, being first duly sworn, on oath, depose and say that I am a respondent in the above-entitled cause; that in support of my motion to proceed in opposition to the petition for a writ of certiorari and any further proceedings in this Court without being required to pay fees or to submit printed briefs, I state that because of my poverty I am unable to pay costs of said proceeding or give security therefor; that I believe I am entitled to redress; and that the position which I desire to present in opposition to the petition for a writ of certiorari is the following: Certiorari should not be granted to review the Order of the United States Court of Appeals for the Second Circuit upon remand for consideration in light of Cuyler v. Sullivan, 446 U.S. 335 (1980), Harris v. Bermudez, 446 U.S.

962 (1980). Said Order of the Court of Appeals for the Second Circuit affirmed the District Court's decision and held that such decision complied with the standard articulated by this Court in Cuyler, supra, for determining Sixth Amendment cases in which an assertion is made by a criminal defendant that he was deprived of effective assistance of counsel arising from multiple representation.

The Order of the Court of Appeals for the Second Circuit is not in conflict with the decision of any other Court of Appeals.

I further swear that the response which I have made to the questions and instructions below, relating to my ability to pay the costs of responding to the Petition for a Writ of Certiorari or the costs of any further or other proceedings in this Court are true.

1. Are you presently employed? If yes, where are your working? B+J IRON WORKS

When do you begin working? August 1980

What is your weekly salary? $194 net

2. Have you received within the past 12 months any income from business, profession or other form of self-employment, or in the form of rent payments, interests, dividents or other source? NO

3. Do you own any cash or checking or savings account? NO

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property, excluding ordinary household furnishings and clothing? 1970 Plymouth given to me as a gift from my brother Nelson Bermudez.

5. List the persons who are dependent upon you for the support and state your relationship to those persons.

Virginia Bermudez, wife, Tammy Bermudez, daughter and Vincent Salamony, step-son

6. Gilbert Epstein, Esq. has represented me in this matter since its inception but is presently a public servant being employed in the office of the Attorney General of the State of New York, and cannot represent me in this matter nor can I afford the services of a private attorney. It would be impossible for me to secure other representation at this time.

7. I understand that a false statement or answer to any question in this affidavit will subject me to penalties of perjury.

Fernando L. Bermudez

FERNANDO BERMUDEZ

Subscribed and sworn to before me this 2nd day of June, 1981.

Joel M. Lutwin

NOTARY PUBLIC

JOEL M. LUTWIN
Notary Public, State of New York
No. 31-4701486
Qualified in New York County
Commission Expires March 30, 1983

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

NO. 80-1806

DAVID R. HARRIS, Superintendent,
Greenhaven Correctional Facility,
ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and
JOSE BONILLA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT JOSE BONILLA IN OPPOSITION

DIANA BUDZANOSKI
WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
[212] 577-3420
Attorneys for Respondent
Bonilla

QUESTION PRESENTED

Whether the Court of Appeals correctly decided that under Cuyler v. Sullivan Respondent Bonilla has been denied the effective assistance of counsel under the sixth and fourteenth amendments because Bonilla was represented at trial by counsel whose obligations to the jointly represented codefendant compelled him to subordinate Bonilla's individual interests to the collective interests of the group and prevented counsel from putting forward the strongest possible defense for Bonilla.

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A. Magistrate's Report and Recommendation

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OPINIONS BELOW

The order of the Court of Appeals and the opinion of the District Court for the Southern District of New York appear in the Appendix to the Petition. The Magistrate's report is appended to this brief.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments VI and XIV. The text appears in the Petition at 2-3.

STATEMENT OF THE CASE

The respondents were indicted, inter alia, for intentional murder. N.Y. Penal Law §125.25(1)(McKinney 1975). In January 1974 they went to trial before the Honorable William Kapelman, J.S.C., and a jury, represented by a retained attorney, Stanley L. Siegel, Esq.

The prosecution witnesses, the family and friends of the deceased, established that the deceased engaged in a fight with the respondents. Medical evidence showed that the deceased received a single fatal stab wound, a bruise, and an abraded lip during the fight. None of the witnesses saw the stabbing occur, and no clear picture of the sequence of events or of the role of each respondent emerged. The prosecutor conceded that he could not prove who inflicted the fatal wound and asked for a guilty verdict if the jury were convinced that the respondents acted as accomplices to cause the death of the victim (T. 90, 101, 197, 162, 201, 220, 229, 263A-265; RA. 3-5).*

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*Numbers prefaced by "T" refer to the trial transcript; by "RA" to the Appendix to Respondent Bonilla's brief; and numbers followed by "a" refer to the Appendix to the Petition.

Respondent Bonilla, the only defense witness, identified the victim as the initial aggressor. Bonilla denied being armed with a knife, and did not believe his friends were either (T. 302-04, 366-69, 371-72). The jury convicted the three of intentional murder. On March 12, 1974, Bonilla received the minimum sentence of 15 years to life on the murder conviction.

Bonilla appealed his conviction to the Supreme Court of the State of New York, Appellate Division, First Department. He argued, inter alia, that he had been denied the effective assistance of counsel, because his individual interests were subordinated to the collective interests of the group, and because counsel was unable to shape Bonilla's defense according to the evidence at trial. He also contended that he had not waived his right to separate counsel. The District Attorney did not dispute this contention and responded only that Bonilla was not prejudiced by the joint representation. The judgment of conviction was affirmed by the Appellate Division on February 15, 1977. Leave to appeal to the New York Court of Appeals was denied by then Chief Judge Breitel on April 14, 1977.

Subsequently, Bonilla petitioned for a writ of habeas corpus in the Federal District Court for the Southern District of New York, as had his codefendants. Respondent Bermudez's petition included the affidavit of defense counsel alleging that before trial in an off-the-record conference counsel had informed the judge that a conflict existed and had requested that his clients have separate counsel, and that the judge replied that this was a "stalling tactic." In response the prosecutor affirmed that it was the judge who raised the question. The judge affirmed that he had raised the issue during a conference in chambers and had instructed counsel to discuss the matter with respondents. Subsequently, counsel assured

him that respondents were satisfied with joint representation.

The petitions of Bermudez and Laureano were referred to a Magistrate. The Magistrate issued a report recommending that the writ be granted in which she specifically concluded that the allegations of the trial judge, if accepted, did not make out consent to the joint representation (RA. 15-17). After the issuance of the report the trial judge submitted a second affidavit in which he alleged that he had inquired of counsel in the presence of respondents whether they had been advised of the risks of joint representation, and further, that he "believed" that he had asked respondents personally whether they wished to proceed jointly represented.

The District Court adopted the findings of the Magistrate, and deemed them applicable to Bonilla. Alluding to both affidavits of the trial judge in the course of deciding that respondents had exhausted their state remedies (an issue petitioners have abandoned in this Court)(6a-7a), the District Court concurred with the Magistrate that respondents were perjudiced by the joint representation and granted the writs.

Petitioners appealed to the United States Court of Appeals for the Second Circuit, raising the same issues of lack of prejudice and failure to exhaust state remedies they had in the District Court. On November 26, 1979, that Court summarily affirmed the granting of the writ on the opinion of the District Court.

Petitioner sought a writ of certiorari. On May 27, 1980, this Court granted the writ, vacated the order below, and remanded for reconsideration in light of Cuyler v. Sullivan, 446 U.S. 335 (1980). On March 11, 1981, the Court of Appeals again affirmed the order of the District Court granting the writs of habeas corpus (2a-3a).

REASONS FOR DENYING THE WRIT

The Court of Appeals correctly found under Cuyler v. Sullivan, 446 U.S. 335 (1980), that Respondent Bonilla's defense was adversely affected by an actual conflict of interest. The only defense available to all three defendants was that none of them did the stabbing; and as the Court of Appeals (3a), the District Court (10a-11a), and the magistrate (RA. 24-25) all concluded, on the facts of this case that was no defense at all.

The strength of the prosecution's case lay in the irrefutable testimony placing the three respondents at the scene and establishing that one of them must have fatally wounded the victim. The weaknesses lay in the lack of proof as to which respondent actually inflicted the wound and when it happened; in the confused and contradictory accounts of the event given by the witnesses; and in the need to rely on varying accounts of each respondent's conduct at the scene to establish that he intended to commit murder.

In the factual and legal posture of this case, Bonilla's only viable defense was to convince the jury that his conduct at the scene demonstrated that he had neither killed nor intended to kill the victim and that one of the others must have. However, counsel avoided clarifying the sequence of events and isolating the conduct of any of his clients, because of the severe risk that limiting the participation of one defendant would redound to the disadvantage of another.

As this Court has recognized, jointly represented defendants may suffer because of what their attorney is prevented from doing. Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978). Consequently, a prejudicial conflict exists when an attorney representing several defendants cannot put forward on behalf of one of them a defense based on the evidence at trial, because it would harm the interests of another. Foxworth v.

Wainwright, 516 F.2d 1072 (5th Cir., 1975); Austin v. Erickson, 477 F.2d 620, 623-26 (8th Cir. 1973); and Robinson v. Parratt, 421 F. Supp. 664, 670-72 (D. Neb.), aff'd, 546 F.2d 764 (8th Cir. 1976). See Smith v. Regan, 583 F.2d 72, 77 (2d Cir. 1978); and United States v. Bernstein, 533 F.2d 775, 788 (2d Cir.), cert. denied, 429 U.S. 998 (1976). It exists when an attorney cannot cross-examine a witness on behalf of one client because of his responsibilities to another. Glasser v. United States, 315 U.S. 60, 72-73 (1942). See Kaplan v. Bombard, supra, 573 F.2d 708, 713 (2d Cir. 1978); and United States v. Bernstein, supra, 573 F.2d at 788. It also exists when counsel should and does not distinguish the position of one defendant and dissociate him from the others because of counsel's divided loyalties. United States ex rel. Hart v. Davenport, 478 F.2d 203, 208-10 (3d Cir. 1973); and Campbell v. United States, 352 F.2d 359, 361 (D.C. Cir. 1965). Bonilla's defense was adversely affected in each of these ways. In short, his counsel was unable to discharge his primary obligation of putting forward the strongest possible defense for his client.

Petitioners accuse the Court of Appeals of judicial speculation (Petition 8) in holding that an actual conflict adversely affected Bonilla's representation and fault that court for citing no specific examples of prejudice from the state trial. Petitioners conveniently ignore the Court of Appeals' adoption of the magistrate's specific and detailed findings (RA. 21-25) of an actual conflict. Implicit in the petition is a recognition that petitioners cannot seriously challenge the finding of an actual conflict, because petitioners have not sought review on this ground.

The futility of challenging the finding of an actual conflict has forced petitioners to metamorphose their claim into one that Bonilla waived his right to contest the joint repre-

sentation, because he consented to it. Petitioners have done an about-face from the position they adopted in the state courts. Bonilla specifically argued in the state courts that he had not waived his right to separate counsel. Petitioners did not dispute that assertion (9a, n.1).

Now petitioners contend that they can show a waiver. Assuming for the purposes of argument that Bonilla could have waived his right to separate counsel, see Wood v. Georgia, ___ U.S. ___, 49 U.S.L.W. 4218 (March 3, 1981), and taking the allegations of the trial judge at their strongest and putting aside the contrary allegations of defense counsel, petitioners cannot demonstrate a waiver. The cursory, off-hand, off-the-record inquiry described by the trial judge does not satisfy the constitutional standard of a knowing an intelligent waiver of a known right. Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). See Cuyler v. Sullivan, 446 U.S. at 350-54 (concurring opinion of Brennan, J.).

So little attention was paid by the trial judge to the inquiry that it was not until he filed a second affidavit in response to the magistrate's criticism that he recealled he may have spoken directly to respondents. There are no allegations from either counsel or the court that Bonilla was given an explanation of what constitutes a conflict of interests, of how his interests might conflict with those of his codefendants, or of the consequences of proceeding with the joint representation.

Specifically, Bonilla was not warned that the intended unified defense might prove to be no defense at all, as the court below found; nor was he advised of possible alternate defenses. There simply was no "voluntary" choice to proceed jointly represented, as petitioners claim. This record does not establish, and no court has found, that Bonilla waived his right to separate counsel. Consequently, the decision of the Court of Appeals is not in conflict with any of the deci-

sions of this Court or with the decisions cited in the petitions at 7.

Finally, there was no improvident exercise of habeas corpus jurisdiction. If petitioners had wanted a hearing in the state courts on the waiver question, they should have sought it while the case was before those courts. In fact, petitioners passed up two opportunities to seek a hearing.* If a hearing were necessary in this case, petitioners would be solely responsible for there having been none. It is too late now, on this second petition for a writ of certiorari, for petitioners to ask for a hearing in the state courts on waiver grounds.

In sum, the court below correctly decided that the unified defense was no defense at all for Bonilla. On no view of the facts can Bonilla be said to have waived his right to separate counsel.

CONCLUSION

FOR THE ABOVE REASONS, THE PETITION SHOULD BE DENIED.

Respectfully submitted,

DIANA BUDZANOSKI
WILLIAM E. HELLERSTEIN
Attorneys for Respondent
Jose Bonilla

May 15, 1981

*Before the direct appeal was perfected in the state courts the District Attorney and the office of the trial judge were advised that Bonilla intended to raise the conflict issue. In an effort to determine whether the trial judge had made an inquiry as required by People v. Gomberg, 38 N.Y.2d 307 (1975), counsel moved to have the record enlarged to include pretrial appearances. In response the District Attorney did not suggest that a waiver had occurred off the record. When Bonilla contended on appeal that there was no waiver, the District Attorney did not dispute this contention, nor did he assert that the record was inadequate and a hearing necessary. See People v. Rivera, 62 A.D.2d 767 (1st Dept. 1978).

APPENDIX A

Magistrate's Report and Recommendation

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA ex rel FERNANDO BERMUDEZ,

Petitioner,

- v -

LEON J. VINCENT, WARDEN, GREEN HAVEN CORRECTIONAL FACILITY, STORMVILLE, NEW YORK,

Respondent.

REPORT AND RECOMMENDATION

77 Civ. 2048 (MEL)

- x

JOSE LAUREANO,

Petitioner,

- v. -

SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY AND DEPARTMENT OF CORRECTIONAL SERVICES,

Respondent.

78 Civ. 1023 (MEL)

- x

These petitions for writs of habeas corpus have been referred to me by the Honorable Morris E. Lasker, District Judge. The two petitioners were codefendants in the state court trial here challenged and they present virtually identical claims. Accordingly, a single report is being submitted for both cases.

Petitioners and another defendant, Bonilla, were charged with acting in concert to commit a variety of crimes.

On March 12, 1974, following a trial by jury, all three were convicted in the Supreme Court of the State of New York, Bronx County, of murder and possession of a weapon. Each was sentenced to concurrent terms of 15 years to life imprisonment and one year imprisonment. On petitioners' appeals to the Appellate Division, their convictions were affirmed without opinion. People v. Bermudez, 46 AD2d 1014 (1st Dept. 1974); People v. Laureano, 46 AD 2d 1014 (1st Dept. 1974). Each petitioner's application for leave to appeal was denied on January 22, 1975.

All three defendants retained Siegel & Graber, Esqs. to represent them on the charges; Stanley Siegel acted as defense counsel at the trial. The claims in the habeas petitions presently before the Court arise out of this joint representation.

The prosecution's position was that the three defendants, who were 19 or 20 years old, had fought with William Travieso, age 16, in the street outside of Travieso's home and that one of them stabbed him, causing his death. It was undisputed that Travieso died of a single stab wound. The prosecutor did not know who had actually inflicted that wound, so his case proceeded on the theory that, since the charge was "acting in concert", the State did not have to

establish which of the defendants had stabbed Travieso. The prosecutor agreed that, if all the defendants pleaded guilty, he would recommend to the Court a sentence of four to twelve years imprisonment for one defendant and much shorter sentences for the other two defendants. Bermudez pet. ¶¶ 9, 15; Epstein aff. attached to pet. ¶¶ 4, 5; Bermudez aff. ¶¶ 8, 9.

At the trial, the testimony of the witnesses as to the involvement of each of the defendants varied. Thus, of the seven prosecution witnesses who testified that they witnessed the fight, several identified Bonilla as having been on top of Travieso and as having had a knife. For example, Angel Torres, testified that he saw Bonilla getting up from Travieso's body with a knife in his hand (143, 161*). Other witnesses identified petitioner Bermudez as having a knife and having been on top of Travieso. For example, Theodoro Travieso testified that Bermudez was on top of Travieso making a "rubbing motion" (100, 106-107) and that when Bermudez was pulled away he took out a knife (115-116). Although one witness identified petitioner Laureano as having a knife (251), and another

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* Unless otherwise indicated, numbers in parentheses refer to pages of the trial transcript.

identified him as being involved in the initial fist fight (31), no one identified him as ever having been on top of Travieso either with or without a knife.

The only defense witness was defendant Bonilla. Bonilla testified that Travieso had started a fight with him as Bonilla was walking down the street with Bermudez and Laureano (299-300, 302, 356-357). According to Bonilla, other people joined the fray; some, including one with a knife, bore weapons (303). Bonilla further testified that none of the defendants had a knife (304, 371-372), that only he, among the defendants, had participated in the fight with Travieso (300-303), and that Laureano had been yelling for the fight to stop (303). On cross-examination, Bonilla's testimony was impeached by a statement he had previously given to an assistant district attorney in which he had denied being at the fight at all (326-334).

As already noted, the prosecutor did not attempt to establish who did the actual stabbing. He presented the State's case on the theory that the State did not have to prove who stabbed Travieso so long as the evidence satisfied the jury that one of the defendants had done so and that the defendants

were acting in concert (see for example the prosecutor's summation at 408-409). As to each of the defendants, the trial court submitted to the jury the charge of acting in concert to commit murder, the lesser included offense of manslaughter in the first degree, and the misdemeanor, possession of a weapon. The court charged that in order for the jury to convict the defendants, or any of them, of acting in concert to kill Travieso, it was not necessary for them to determine which of the defendants had done the actual killing (452).

Approximately three hours after the jury had begun to deliberate, it sent the following note to the trial court (487):

> "One. What constitutes acting in concert. Explain in detail.
>
> "Two. Repeat definition of intent. Please explain in detail."

The Court then re-explained these concepts. While doing so, it made the following remark (490): "As evidence in this case may indicate, the degree of participation of each defendant is not the same in the alleged crime, especially in the killing of William Travieso. Obviously, only one knife went into his body. So therefore, only one of the three could have been . . . the actual killer." Approximately

45 minutes after the jury returned to its deliberations, it brought in its verdicts that all three defendants were guilty of murder and possession of a weapon (497, 502-504).

Bermudez and Laureano argue that the representation of all three defendants by the same attorney violated their Sixth Amendment right to adequate representation by counsel. In essence they make two arguments. The first is that they were prejudiced by the "all or nothing" defense which was made, because such a defense required the jury to believe that Travieso was killed by one of his own family or friends and therefore was utterly ineffectual. The second is that, because he represented all three defendants, and could abandon none of them, counsel was precluded from developing effective defenses, such as disassociating one defendant from the others, distinguishing among the degree of participation of each and shifting the blame from one to the others. Bermudez also alleges that he was prejudiced at the plea bargaining stage because the joint attorney had to remain neutral during those proceedings and could not be effective as to each individual.*

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* Laureano also alleges prejudice from the failure of defense counsel to request charges to lesser offenses. Counsel for Laureano has not seriously urged this point and, since it does not appear how joint representation could have affected counsel's decision not to request charges to lesser offenses, this allegation need not be discussed.

These cases present two main issues for decision, namely, whether the petitioners exhausted their state remedies and whether they were prejudiced by joint representation. This report will begin with a general discussion of the petitioners' claim because an understanding of their claim is necessary to a decision on the threshold issue of exhaustion.

Joint representation of criminal defendants has received close scrutiny and much disapproval in recent years. See for example the discussion in United States v. De Filippo, _____ F.2d _____ (2d Cir., Docket Nos. 78-1217-18, decided Jan. 8, 1979), slip opin. at 840-843. The petitioners rely on the line of cases establishing that, where there is joint representation of criminal defendants, the trial court has the responsibility to make inquiry as to the existence of possible conflicts of interest, to personally advise the defendants of such possible conflicts and to allow the defendants to express their views. United States v. Carrigan, 543 F.2d 1053, 1055 (2d Cir. 1976), and cases cited therein. In this Circuit, if there has been such an

inquiry, and the joint representation continues, the defendants have the burden of establishing that the joint representation resulted in "some specific instance of prejudice". Salomon v. LaVallee, 575 F.2d 1051, 1054 (2d Cir. 1978); Kaplan v. Bombard, 573 F.2d 708, 712 (2d Cir. 1978); United States v. Carrigan, supra, 543 F.2d at 1055. If there has not been such an inquiry, the burden shifts to the prosecution to show lack of prejudice. See, e.g., United States v. Carrigan, supra, 543 F.2d at 1056; United States v. DeBerry, 487 F.2d 448, 453 n.6 (2d Cir. 1973).

The shifting burden principle applies in cases challenging state convictions as well as in cases on direct review. In Salomon v. LaVallee, supra, 575 F.2d at 1055, the Court of Appeals, citing Kaplan v. Bombard, supra, 573 F.2d at 714 n.7, noted that it had "recently indicated, without discussion, that this standard should be applied in collateral review of convictions as well as on direct appeal." See also Mone v. Robinson, 430 F.Supp. 481, 484 (D. Conn. 1977). The Court in Salomon found that no such inquiry had been made as to Salomon and remanded the case "for a reconsideration

of the issue of prejudice, with the burden this time on the state to show its absence and not, as in the decision appealed from, on appellant to demonstrate its existence". 575 F.2d at 1055.* The Court then stated that the issue of allocating the burden of proof in cases challenging joint representation at state trials would not be "ripe for decision" unless the state were unable to show an absence of prejudice. Id. However, in view of the remand, the District Court must at this time assume that the shift in burden does apply to cases challenging state convictions.**

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* On remand, the District Court (Goettel, J.), in a decision dated February 16, 1979 (Docket No. 76 Civ. 1640), found that the prosecution had sufficiently established the absence of prejudice.

** A more recent Court of Appeals decision has left the law on this point unchanged. In Smith v. Regan, 583 F.2d 72, 77 (2d Cir. 1978), the Court held that, assuming the burden had shifted to the prosecution, there was no conflict or prejudice from the joint representation.

EXHAUSTION OF STATE REMEDIES

It is indisputable that each petitioner presented to the state courts the claim that his constitutional right to the effective assistance of counsel was violated by the joint representation of all three defendants at the trial. See Bermudez's Brief to Appellate Division, pp. 12-15, attached as Exhibit 1 to Petition; Laureano's Brief to the Appellate Division, pp. 19-22, attached to letter from Laureano's counsel dated November 27, 1978. Both briefs raise squarely the issue of the trial judge's obligation to inquire into potential conflicts of interest and cite the leading case on the subject at that time, United States v. DeBerry, supra, 487 F.2d 448.*

However, the respondents urge that the petitioners must resort to the state courts a second time because they

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* There is one variant in the claim presented here from the claim made in the state courts. Here Bermudez points to prejudice in the plea bargaining stage, although he did not specify such prejudice in the state courts. Laureano's counsel "has not alleged prejudice in the plea bargaining stage out of an abundance of caution as to the exhaustion doctrine . . . ." Laureano Post-Argument Mem. of Law at 7 n.2. Under the principle of Smith v. Regan, supra, 583 F.2d at 75 n.1, the addition of a new illustration of prejudice does not require a return to the state courts. In Smith, the Court concluded that there was exhaustion even though "[n]ot all the particular instances of conflict raised in Smith's habeas petition were presented to the state courts . . . ."

are now presenting new facts which significantly affect their claim.

The new facts appear in various affidavits submitted by Bermudez and, in response, by the State.* Stanley L. Siegel, the petitioners' trial attorney, states that in an off-the-record pre-trial conference he informed the trial judge that there was a conflict of interest between the defendants requiring separate counsel and that this request was rejected as a "stalling tactic". Siegel Aff. ¶ 6, attached to Bermudez petition. The trial judge, William Kapelman, in an affidavit submitted by the respondents, says that it was he who raised the issue of conflict with Siegel, that Siegel advised him there was no problem, that he (Justice Kapelman) nonetheless told Siegel to discuss the question of conflict with his clients and that Siegel later reported that he had done so and that his clients wished him to continue to represent all three. Kapelman Aff. ¶¶ 4-6, attached to Gambale Aff. William Quinn, who

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* In the Laureano case, the respondents initially conceded that, since no such new material was submitted on behalf of Laureano, there had been exhaustion as to him. See Feinberg Aff. ¶ 5; Resp. Mem. of Law at 3. However, on oral argument, counsel for Laureano asked that the record in the Laureano case be expanded to include the new material (apparently in order to take advantage of whatever support such material might lend to Laureano's position on the merits). Accordingly, on the exhaustion issue, the two petitioners are now in the same position.

was the prosecutor, states that Siegel never, either before or during the trial, raised the issue of conflict and that the trial judge himself raised it with Siegel at an off-the-record conference. Quinn Aff, ¶¶ 3-4, attached to Gambale Aff. Petitioner Bermudez says that defense counsel never discussed with him any problem from joint representation. Bermudez Aff. ¶ 7. It is undisputed that no discussion of possible conflicts of interest was ever had on the record. It is also undisputed that at no time did the trial judge himself address the defendants, as a group or individually, about their joint representation. —

Exhaustion of state remedies has not occurred unless a petitioner has "fairly presented" his federal constitutional claim to the state courts. Picard v. Connor, 404 U.S. 270, 275-276 (1971). If the new facts presented on these petitions do not "materially alter the claim or crucially affect its determination", the petitioners need not resort to the state courts for a second presentation of their claims. Anderson v. Cassclas, 531 F.2d 682, 684 (2d Cir. 1976). The petitioners presented to the state courts the identical claim made here: the trial judge had an obligation to inquire into potential conflicts; and they cited to the state courts a case (United States v. DeBerry, supra, 487 F.2d 448) spelling out that obligation, which was decided a year before petitioners' trial.

Since the petitioners specifically alleged in the state courts, and allege here, that the trial court had a duty to speak to them about potential conflicts and to give them an opportunity to express their views, nothing in the affidavits presented to this Court significantly alters their claim. Neither the allegation by defense counsel that he raised the issue with the judge nor the allegation by the petitioner that defense counsel did not discuss the issue with him materially adds to the claim, nor critically affects its determination.* Under these circumstances, the state courts have had a fair opportunity to review petitioners' claim.

Moreover, even if the new facts did materially alter the claim or affect its determination, a second resort to the state courts is unnecessary. Where resort to the state courts clearly would be futile, because those courts have had a recent opportunity to consider the identical claim, a petitioner need not resort to the state courts before obtaining federal habeas relief. United States ex rel Sero v. Preiser, 506 F.2d 1115, 1130 (2d Cir. 1974), cert. denied sub. nom. Preiser v. Sero, 421 U.S. 921 (1975). See Salomon v. LaVallee.

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* The new facts do not materially affect the respondents' position either. As shown infra at 15-17, even under the facts set forth by Justice Kapelman, whatever inquiry occurred was insufficient to establish consent.

supra, opin. of Goettel, J. dated Feb. 16, 1979 at 6-7. In a submission dated November 27, 1978, counsel for Laureano shows that, on Bonilla's appeal to the Appellate Division, and as part of Bonilla's attack on joint representation, the Court was presented with the very allegation presented here by the petitioners, namely, that Siegel advised the trial court at an off-the-record pre-trial conference that there was a conflict of interest among the defendants and that the Court responded that Siegel was merely trying to delay the trial. Counsel notes that, with this allegation before it, the Appellate Division affirmed Bonilla's conviction without opinion and without remanding for a hearing. People v. Bonilla, 56 AD2d 740 (1st Dept. 1977), lv. denied, 42 NY2d 826 (1977). The respondents' sole opposition to reliance on the record made in the Bonilla case is that the Appellate Division panel may have differed in that case from the panel in Hermudez and Laureano. Such a difference, if there were one, would not be a sound basis for requiring a second resort to the state courts.

PREJUDICE

The preliminary question as to prejudice is whether it must be proved by the petitioners or disproved by the respondents. Since the burden shifts to the prosecution only where the inquiry into possible conflicts of interest has been insufficient (see discussion supra at 7-9), we must examine the nature of the inquiry required. In Kaplan v. Bombard, supra, 573 F.2d at 715 n.9, the Court of Appeals indicated that the same degree of inquiry necessary in federal cases, where the Court's supervisory powers as well as the defendant's constitutional rights are in issue, will not be required in collateral reviews of state convictions, where the Court's powers are more limited. However, as indicated by Kaplan, a state trial court must conduct a sufficient inquiry to satisfy itself that the defendant knowingly consented to joint representation after having been advised by the court of the risks from such representation.

In Kaplan, the trial judge conducted a hearing, on the record, as to the joint representation. The judge addressed the three defendants in the presence of counsel

"to determine if they viewed their defense 'as being in conflict or that there might be a conflicit of interest with respect to any attorney that represents all three of you'". Kaplan, supra, 573 F.2d at 711. The judge did not address Kaplan personally or obtain his express consent to joint representation on the record, but rather relied on counsel's representations, made in Kaplan's presence, that no conflict existed. The Court of Appeals held that, under the facts of that case, the failure of the trial court to address Kaplan personally and to elicit a response from him on the record did not preclude a finding of consent to joint representation. Kaplan, supra, 573 F.2d at 714. In so holding, the Court noted that Kaplan "was warned specifically about a possible conflict by the trial judge", that he had been offered the opportunity to obtain separate counsel and that, although he had heard defense counsel report his consent to joint representation, he had not objected to such representation either during the pre-trial inquiry or during the trial. Kaplan, supra, 573 F.2d at 714-715.

The respondents rely on the affidavit of Justice Kapelman, described supra at 11, as showing that there was an inquiry sufficient under Kaplan to establish consent to the joint representation. But the circumstances alleged here do not remotely approximate the requirements of Kaplan. All that Justice Kapelman's affidavit describes is his off-the-record request that counsel discuss the issue with his clients and his reliance on counsel's later statements, also not on the record, that after the requested discussion, they reaffirmed their consent to joint representation. There is no claim that Justice Kapelman himself ever addressed the defendants, either singly or together. Nor is there any claim that Justice Kapelman relied on representations of counsel made in the presence of the defendants.

Accordingly, the burden is on the State to establish the absence of prejudice. As noted by Judge Goettel in his recent decision in Salomon, supra, it is difficult to determine the exact nature of that burden and to determine

whether in a given case it has been met.* See slip opin. at 9-15. Here, however, such issues are only of academic interest since, even were the burden on the petitioners to prove prejudice, they have amply met that burden.

The respondents' position that the petitioners were not prejudiced by joint representation rests on two arguments. One is that, since the three defendants presented a unified, consistent defense at the trial, there was no prejudicial conflict of interest between them. The other is that the claim of prejudice is improperly based on mere speculation as to what independent trial counsel might have done.

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* Judge Goettel assumed that the burden on the State would have to be met "by a preponderance of the evidence", citing United States v. Foster, 469 F.2d 1, 5 (1st Cir. 1972), which is the First Circuit case followed by this Circuit when it adopted the shifting burden principle. See slip opin. at 13. The Court of Appeals for the Second Circuit has not specifically stated what standard applies to the State's burden. Some courts have required that lack of prejudice be established beyond a reasonable doubt. See, e.g., Lollar v. United States, 376 F.2d 243, 247 (D.C. Cir. 1967). Since the examination into whether a trial error of constitutional dimensions has not caused prejudice is, in effect, an application of the harmless error rule (see Holloway, supra, 435 U.S. at 487-491), the reasonable doubt burden appears to be the appropriate one to apply. See Chapman v. California, 386 U.S. 18 (1967); Lollar v. United States, supra.

It is true that the defendants presented a unified, consistent defense at the trial. It is also true that mere speculation that independent counsel would have pursued alternative defenses is not a proper basis for a finding that joint representation was prejudicial. See, e.g., United States v. Wisniewski, 478 F.2d 274, 284 (2d Cir. 1973); United States v. Lovano, 420 F.2d 769, 774 (2d Cir.), cert. denied sub nom. Lovano v. United States, 397 U.S. 1071 (1970). But not all claims as to alternative defenses may be dismissed as mere speculation. As noted in Wisniewski, supra, the Court of Appeals is not saying that post-trial assertions of what independent counsel could have done "are to be ignored. Each case must, of course, be viewed on its own facts". Similarly, it is incorrect to say that prejudice can be manifested only by conflicting defenses at trial as occurred in the cases relied upon so heavily by the respondents, namely, United States v. Carrigan, supra, 543 F.2d 1053, where one defendant gave testimony which directly contradicted his codefendant's statement to the FBI, and United States v. DeBerry, supra, 487 F.2d 448, where one defendant testified that his codefendant had given him money to purchase drugs.

As the Supreme Court recently emphasized in Holloway v. Arkansas, 435 U.S. 475, 489-490 (1978): "Joint

representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing." In declining to make inquiry into whether joint representation had resulted in harmless error, the Court stated (435 U.S. at 490-491):

> ". . . in a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process."

In Holloway, the Supreme Court held that whenever a trial court improperly requires joint representation in the face of timely motions for separate counsel, prejudice is presumed and a specific prejudicial conflict of interest need not be independently shown. Because of this holding, it was unnecessary for the Court to reach any conclusions as to actual prejudice to the defendants. Also, as the Court of Appeals for the Second Circuit has noted, the Supreme Court in Holloway "reserved judgment on the standard governing" cases, such as the ones at bar, where counsel does not make a timely motion for separate

representation.* United States v. De Fillipo, supra, slip opin. at 841 n.14. However, the Supreme Court's view of the nature of the evil created by joint representation of conflicting interests, as described above, was one of the main bases for its decision to presume prejudice and to decline to inquire whether joint representation had resulted only in harmless error. 435 U.S. at 490-491.

Implicit in the Court's reasoning in Holloway is that a mere lack of inconsistent defenses at the trial does not in itself establish an absence of prejudice. Indeed, a consistent defense at trial may actually be a reflection of a prejudicial conflict of interest between jointly represented defendants. As noted by Professor Geer in "Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney", 62 Minn. L. Rev. 119, 128 (1978)**:

> "If a defense is available to one defendant, but not to another, or if it would conflict with the

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* While there is a dispute as to whether trial counsel in these cases raised the issue of conflict (see discussion supra at 11-12), it is undisputed that no actual motion for relief was made and that, at best, an informal off-the-record request was made. Accordingly, although counsel for Laureano has cited the Holloway holding (Laureano post-argument mem. at 4), the petitioners do not rest their claims here on an alleged improper denial of a timely motion.

** Professor Geer's comprehensive article is cited approvingly in United States v. De Fillipo, supra, slip opin. at 842-843.

> defense of another, the attorney might seek to avoid weakening the defense of the latter by imposing an enforced harmony of defenses for the benefit of all defendants rather than asserting a separate defense for each. What may then emerge is a collective defense with no appearance of inconsistency on the trial record. As a result, one defendant is deprived of a potentially meritorious defense solely because of the multiple representation."*

The circumstances here amply demonstrate that there was "an enforced harmony of defenses" and a deprivation of potentially far more effective defenses which prejudiced the petitioners. The murder victim, Travieso, was killed by a single stab wound. The theory of the State's case was that the three defendants, acting in concert, had murdered Travieso. Since there was only the single stab wound, only one of the defendants could have inflicted the fatal wound. The other defendants were to be convicted on a showing of specific intent to commit murder in concert with the actual

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* That such deprivation may be a manifestation of prejudice accords with the general principle (in cases challenging adequacy of representation on grounds other than prejudice from joint representation) that inadequacy of representation may be shown by omissions as well as commissions. See summary description of such cases in Ennis v. LeFevre, 560 F.2d 1072, 1076 (2d Cir. 1977), cert. denied 435 U.S. 976 (1976).

assailant. Under the State's theory, and the Court's charge, it was not necessary for the jury to determine which of the defendants had stabbed Travieso so long as it found that one of them had. Thus, a finding of specific intent was of unusual significance.

The evidence was overwhelming that all three of the defendants were at the scene of the crime; they did not dispute this fact. Also, there was no question that the only other people at the scene of the crime were Travieso's family and friends and that their purpose in being there was to assist him.

A review of the unified, consistent defense presented at the trial establishes the hollowness of the argument that actual conflict or prejudice exists only where the defenses at trial are inconsistent. Counsel's defense strategy is illustrated by his summation. He urged that there was "not one scintilla of proof that these defendants killed anyone" (389, 391); he emphasized the conflicts in testimony as to what actually occurred at the scene of the crime and the confusion surrounding the event (390, 393-394); and he argued that, in the confusion, "It could have been any member of [Travieso's] friends or family" who killed him (393). Quite correctly, the prosecutor, in summing up,

made the following response to defense counsel's summation (402):

> "He is trying to say it was one of their own family. How ludicrous. How ludicrous. That's an insult to your intelligence."

Of course, the prosecutor's views as to the worthlessness of the defense are not controlling. What matters is that, under the circumstances, he was right.

As the respondents acknowledge, the identity of the actual assailant was not an issue in the case. See Gambale aff. at ¶29. Since the prosecution did not have to establish the identity of the actual assailant to obtain the conviction of all three defendants, a defense based upon the inability of the jury to identify the actual assailant was of extremely limited value. Moreover, there was undisputed evidence that all three defendants were at the scene of the crime and that the only other people there were family and friends of Travieso whose sole purpose was to assist him. Thus, the evidence was overwhelming that one of the defendants had fatally stabbed Travieso; for the jury to believe otherwise they would have had to attribute the crime to one of Travieso's family members or friends.

In the face of this compelling evidence that at least one of the defendants was guilty, defense counsel, in

order not to abandon any of the defendants he represented, was forced to take the non-contradictory, but extremely weak, position that all three were innocent and that Travieso might have been killed by one of his friends or a member of his family. He could not pursue any of the potentially effective defenses available to the individual defendants which would have benefitted one to the detriment of the others.

In view of the prosecution's position and the nature of the evidence, two lines of defense, precluded by joint representation, were particularly appropriate, namely, dissociating one defendant from the others and shifting the blame from one to another.

As noted in United States v. Glasser, 315 U.S. 60, 76 (1942), it is "especially important" that a defendant have the "undivided assistance of his counsel" in conspiracy cases. "[T]he very nature of [a conspiracy] charge suggests the desirability of dissociation." Fryar v. United States, 404 F.2d 1071, 1073 (10th Cir. 1968), cert. denied 395 U.S. 964 (1969). In United States v. Lovano, supra, 420 F.2d 769, the appellants had been charged with conspiracy to violate federal counterfeiting laws. Appellants, who had been jointly represented at their trial, argued that one's defense of entrapment and the other's defense which denied the conspiracy were inconsistent. The Court rejected this claim since they

had been "involved in completely different aspects of the conspiracy" and, therefore, their defenses were not inconsistent. 420 F.2d at 774. However, the Court noted that "[I]f the relationship between appellants was such that Genova could have implicated Lovano, or Lovano could have proved that Genova played a greater role in the counterfeiting scheme than he claimed," the allegation of conflict "would have merit". Id.

Dissociation and shifting the blame were particularly indicated in this acting in concert case because of the differences in the evidence as to each defendant and because only one of the defendants could have inflicted the fatal wound. While petitioners' counsel could (and did) argue, in a conclusory way, that the individual defendants had no specific intent to commit murder, such an argument, unaccompanied by a meaningful attempt to distinguish and disassociate one defendant from the others, is largely an exercise in rhetoric. Counsel lacked an essential tool for making such a defense, namely, the freedom to shift the blame for the actual stabbing to a codefendant and then dissociate his client. He could not effectively present the defense that one — or two — of the defendants did not have the requisite intent because to do so would have

inculpated the remaining defendant or defendants.*

In a case in another Circuit, the Court accepted a claim of prejudice based on facts similar to those at bar. In Foxworth v. Wainwright, 516 F.2d 1072 (5th Cir. 1975), four teenagers, prisoners at the Florida Industrial School at Marianna, were convicted of murdering a boy who had been found dead in the cell where nine boys were confined together. The other four boys testified for the prosecution that the defendants had held the victim down and choked him with a stick. The defense claimed that the murder had been accomplished by the four prosecution witnesses and not the four defendants. Under this theory, which the State termed "united we stand, divided we fall", each defendant shared the same interest in discrediting the prosecution witnesses, and the common defense did not appear to create conflicting interests. But the Court found that a conflict existed in the initial choice of defense strategies which precluded counsel from defending Foxworth by shifting the responsibility to a codefendant. The Court found that a strategy of shifting the blame was a realistic alternative

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* As to the significance of the lack of specific intent defense in circumstances like this and the corollary significance of the relationship between the codefendants, see People v. May, 9 AD2d 508, 509-513 (1st Dept. 1960).

since one 17 year old defendant was the oldest boy in the group and the evidence against him was more directly damaging than the evidence against Foxworth.

The circumstances here are even more indicative of a prejudicial conflict than those in Foxworth. In Foxworth, apparently all the defendants were charged as principals in the murder. There was not the special situation involved here that only one defendant could have been the actual assailant. In addition, in Foxworth, the united defense actually presented had the virtue of being plausible; the argument that the murder was done by the four prosecution witnesses, rather than by the four defendants, was not inherently unreasonable but, rather, was supported by some evidence. Here, as already described, the unified defense was hopelessly ineffectual.

Thus, the cases at bar involve more than the existence of a separate, non-conflicting defense available to one defendant but not the other. Cf. Kaplan v. Bombard, supra, 573 F.2d at 713. And they involve more than a mere disparity in the quantity of evidence against each of the defendants. Cf. United States ex rel. Ross v. La Vallee, 448 F.2d 552, 555 (2d Cir. 1971). Here, the peculiar nature of the evidence and the theory of the prosecution's case made prejudice from joint representation at the trial virtually

inescapable.

An examination of Bonilla's testimony, and of the circumstances giving rise to that testimony, support this conclusion. That Bonilla's statements were exculpatory of his codefendants, does not establish an absence of prejudice from his testimony. See Austin v. Erickson, 477 F.2d 620, 623-624 (8th Cir. 1973). As stated in Morgan v. United States, 396 F.2d 110, 114 (2d Cir. 1968), there is a special danger of prejudice

> ". . . where there is a question as to whether either or both of the defendants should take the stand. This kind of decision, difficult enough where two defendants at the same trial are represented by different counsel, is made doubly difficult where they are represented by the same counsel. The decision whether a defendant should testify may be unduly affected by the risk that his testimony may develop so as to disclose matters which are harmful to the other defendant or which conflict with the other defendant's story. The attorney's freedom to cross-examine one defendant on behalf of another will be restricted where the attorney represents both defendants. And if, where two defendants are representated by the same attorney, one defendant elects to take the stand and the other chooses not to, the possible prejudice in the eyes of the jury to the defendant who does not take the

take the stand is almost inescapable."*

See Geer, supra, 62 Minn. L. Rev. at 130 n.39, 129-131. See also United States v. DeBerry, supra, 487 F.2d at 453. On the other hand, that Bonilla was the only defendant who testified does not in itself establish prejudice. In Kaplan v. Bombard, supra, 573 F.2d at 713, the petitioner claimed that the testimony of one of three codefendants concerning that codefendant's lack of motive had in turn emphasized the motive of the other two. In rejecting this argument, the Court of Appeals noted that the prosecution had charged uniform participation by each defendant, that there was a common interest in attacking the credibility of the State's witnesses and that, to the extent the testimony of the codefendant impugned the credibility of the State's witnesses, it aided in the defense of the other two defendants. Id.

The circumstances at bar are significantly different from those involved in Kaplan. Here, the special danger

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* In his affidavit, at paragraph seven (attached to Bermudez pet.), trial counsel Stanley L. Siegel describes the decision made here. He states that he determined at trial that defendants' view of the case should be presented. He goes on to say: "I then had to decide which of the versions of the events related by the defendants was least harmful to the other defendants on trial. JOSE BONILLA's version, which he testified to at the trial, did not harm the other defendants and that is why I selected him to testify and why I chose not to put the other defendants, BERMUDEZ and LAUREANO, on the stand."

described in Morgan, supra, was not avoided. The theory of the State's case and the nature of the evidence demonstrate that uniform participation was not charged. Rather, the State relied on an acting in concert charge to convict three defendants without the need for identifying the actual, single assailant. Accordingly, the freedom of each defendant to develop individualized defenses involving a non-neutral posture toward one or both of his codefendants was essential.

Compare United States v. Wisniewski, supra, 478 F.2d 274, 281-285, where after the trial court had made "repeated searching inquiries" (p. 284) into potential conflicts of interest and both the defendants and their counsel had affirmed that none existed, the defendants, who were charged with the knowing receipt and concealment of stolen automobiles, presented a unified defense of lack of guilty knowledge. Unlike the unified defense presented here, nothing in the nature of the charge or the evidence made that defense unrealistic. Under the circumstances in Wisniewski, the Court rejected the claim that joint counsel had improperly failed to call one of the defendants to the stand and develop an individualized defense for him.

Here, only by abandoning Bonilla could counsel have "cross-examined" him in an attempt to establish that the others had not acted with him. Thus, that Bonilla's statements

on the witness stand did not implicate his codefendants but, rather, tended to exculpate them, is not sufficient to establish a lack of prejudice. See Austin v. Erickson, supra, 477 F.2d at 623-624. Moreover, although Bonilla's testimony did not harm his codefendants directly, it did do so indirectly. Bonilla's testimony was impeached by a statement he gave prior to trial that directly contradicted his trial testimony. Because of the "enforced harmony" of their defense, the codefendants were necessarily associated with this impeached witness.

While the above-described circumstances sufficiently establish the prejudicial nature of the joint representation, a separate instance of prejudice existed at the plea bargaining stage. The Supreme Court in Holloway v. Arkansas, supra, 435 U.S. at 490, noted that the joint representation in that case "may well have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution . . . ." For an extensive discussion of the dangers of joint representation at the plea bargaining stage see Geer, supra, 62 Minn. L. Rev. at 125-127. Bermudez argues here that separate counsel would have been able to bargain separately with the prosecution and, therefore, could have bargained on his individual behalf for something more favorable than what, on an all or nothing

basis, was offered to the three defendants. Under the circumstances of this case, where uniform participation of all three defendants was not charged, it is my conclusion that the absence of independent counsel free to negotiate individually on behalf of each defendant deprived the petitioners of effective legal assistance at one of the most significant stages of their criminal case.

Smith v. Regan, supra, 583 F.2d at 76, relied upon by the respondents for the position that there was no prejudice at the plea bargaining stage is distinguishable; indeed, if anything, a proper analysis of the Court's reasoning in Smith supports the conclusion here. While here as in Smith the prosecutor offered only a "package" deal, other factors significant to the decision in Smith are not present here. In Smith there was overwhelming evidence of the guilt of Smith as well as his codefendant; the defendants were offered an identical plea, and there was not "the slightest indication" that a separate bargain might have been obtained for Smith by separate counsel "since the prosecutor had an iron-clad case against both defendants, with four witnesses who could (and did) positively identify" both of them as the robbers.

Here, although there was overwhelming evidence that one of the three codefendants had killed Travieso, there

was by no means overwhelming evidence as to which defendant had done so; indeed, the prosecutor did not even attempt to establish which had done so. Nor can it be said that there was overwhelming evidence that either Bermudez or Laureano had the requisite intent to be held responsible for the crime even if he did not stab Travieso. Also, here, in contrast to Smith, the State offered an all or nothing plea in which one defendant would get a very long sentence and the others would get shorter sentences. This was an acknowledgement by the State that only one of the three defendants could have done the actual stabbing and that, therefore, the case against the three defendants was not essentially the same. Thus, it cannot be said that the State could have no interest in obtaining from one or two of the defendants a plea and an agreement to testify for the prosecution. If, for example, the State had been required to prove its case against Bonilla, it cannot be said that it would have made no sense for the State to accept a plea to a lesser offense from Laureano or Bermudez or both.

In sum, were the burden on the petitioners to show the existence of prejudice, I would conclude that they have amply met that burden. At the least, if the shift in burden is to be accorded any significance, the State cannot be said

to have met its burden of establishing the absence of prejudice.*

Copies of this report and recommendation are being mailed today to counsel for all parties, who are hereby advised that they may serve and file written objections or comments with the Court, with a copy to me, within 10 days.

Respectfully submitted,

Nina Gershon

NINA GERSHON
United States Magistrate

DATED: New York, New York
April 13, 1979

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* Both counsel for the respondents, who bear the burden on the prejudice issue, and counsel for the petitioners indicated at oral argument that there was no need for an evidentiary hearing as to prejudice. I agree with counsels' assessment that all material facts are presently before the Court.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1806

DAVID R. HARRIS, Superintendent,
Greenhaven Correctional Facility,
ROBERT J. HENDERSON, Superintendent,
Auburn Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and
JOSE BONILLA,

Respondents.

AFFIDAVIT OF SERVICE

HILLARD WIESE, a member of the bar of this Court hereby certifies that on April 16, 1981, a copy of the petition was received in this case and on May 15, 1981, he mailed a true copy of the Motion for permission to Appeal In Forma Pauperis and the brief for Respondent Bonilla in opposition herein to Hon. Mario Merola, District Attorney, Bronx County, 215 East 161st Street, Bronx, New York 10451, counsel for petitioners and Ruth Kessel, Esq., Prisoners' Legal Services of New York, 20 Vesey Street, New York, New York 10007, counsel for Respondent Laureano. He has not served Respondent Bermudez who is no longer represented by counsel and whose present whereabouts are unknown.

HILLARD WIESE

Sworn to before me this

15th day of May, 1981

CLAUDIA VAN WYK
Notary Public, State of New York
No. 31-4733225
Qualified in New York County
Commission Expires March 30, 1982

NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-1806

DAVID R. HARRIS, Superintendent of Greenhaven Correctional Facility, et al.,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO, and JOSE BONILLA,

Respondents.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Respondent, Jose Bonilla, respectfully applies for leave to proceed in forma pauperis in connection with the filing of his brief in opposition to the petition for a writ of certiorari. In the appellate courts of New York, respondent was allowed to proceed as a poor person and was represented by the Legal Aid Society of New York. Such counsel have agreed to represent respondent in this Court without expense to him. Respondent's affidavit in support of the within application is annexed hereto.

Dated: New York, New York
May 7, 1981

Respectfully submitted,

Diana Budzanoski

DIANA BUDZANOSKI
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New York, New York 10038
212 -577-3420
Counsel for Respondent Bonilla

IN THE

SUPREME COURT OF THE UNITED STATES

1981 TERM

NO.

DAVID R. HARRIS, Superintendent of Greenhaven Correctional Facility, et al.,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO, and JOSE BONILLA,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS IN FILING A BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

STATE OF NEW YORK)
) ss.:
COUNTY OF)

I, JOSE BONILLA, being first duly sworn depose and say that I am a respondent in the above-entitled case; that in support of my motion to proceed in filing a brief in opposition to the petition for a writ of certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding; that I believe I am entitled to the redress ordered by the Court of Appeals for the Second Circuit.

I further swear that the responses which I have made to the questions and instructions relating to my ability to pay the cost of proceeding are true.

1. I am presently employed by National Viewtech Medford, N.Y. 11763 (516) 698-5600 I earn $130/week net. In the approximately 15 months since my release from prison pending a final determination of this case I have held several jobs. In my previous employment I received lower wages. I pay $40/week rent.

2. I have not received within the past 12 months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, apart from that accruing on the savings account reported in paragraph 3, dividends or other sources.

3. I have a savings account with $500. I do not own any cash apart from my wages reported in paragraph 1.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property.

5. No one is dependent on me for support. Occasionally I send a little money to my mother.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

JOSE BONILLA

Sworn to before me this
9th day of May, 1981

Notary Public

JOSEPH A. KOLLER
NOTARY PUBLIC, State of New York
No. 43-4178126, Suffolk County
Term Expires March 30, 1983

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 80-1806

DAVID R. HARRIS, Superintendent, Greenhaven Correctional Facility, ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Brief for Respondent in Opposition

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1806

DAVID R. HARRIS, Superintendent, Greenhaven Correctional Facility, ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

BRIEF FOR RESPONDENT LAUREANO IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Appeals correctly decided that Respondent Laureano was denied effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution because an actual conflict of interest due to multiple representation adversely affected his trial attorney's performance and that Respondent Laureano has not waived his rights to separate counsel.

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OPINIONS BELOW

The petitioners, David R. Harris, the Superintendent of the Greenhaven Correctional Facility et ano have asked this court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on March 11, 1981. The order of the Second Circuit Court of Appeals which is reproduced in Petitioners' Appendix A at pages 1a-3a, affirmed the order of the District Court on the opinion of the Hon. Morris E. Lasker, which has been reproduced in Petitioners' Appendix B at pages 5a-11a. Judge Lasker's opinion in turn incorporated and affirmed the Magistrate's Report reproduced in the Appendix to Respondent Bonilla's Brief in Opposition at pages 1RA-35RA.

JURISDICTION

Respondent, Jose Laureano, incorporates Petitioners' jurisdictional statement found on page 2 of the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the right to effective assistance of counsel in the Sixth Amendment to the United States Constitution, set forth at page 2 of the Petition, and the right to due process in the Fourteenth Amendment to the United States Constitution, set forth at pages 2-3 of the Petition.

STATEMENT OF THE CASE

Respondent respectfully submits that the questions presented in the petition, addressing as they do the broad issues of actual conflict and purported consent are inextricably intertwined with the very particular facts of this case as they occurred both during the State Court trial and subsequent appeals as well as the post conviction remedy pursued by Respondent Laureano. Because these facts are essential to an understanding of the opinions below, the evidence at trial is outlined first, followed by a discussion of the prior proceedings in the state and federal courts.

EVIDENCE AT TRIAL

On the night of January 28, 1972, three friends, Jose Bonilla, Fernando Bermudez and Jose Laureano, were walking along the sidewalk on Simpson Street in the Bronx. William Travieso, who lived nearby, was walking in the opposite direction, and jostled Bonilla as he passed the three friends. Words were exchanged and a fist fight erupted.

Travieso's friends and family came out into the street to intervene in the fighting. Travieso was knocked to the ground and someone was on top of him. At least one person had a knife and Travieso was stabbed. He died of a single stab wound.

The prosecution witnesses consisted primarily of those members of Travieso's family and those friends who intervened in the fight. Different witnesses saw different things, and the sequence of events was confused, at best. Despite the confusion concerning which of the other defendants were where when, none of the witnesses placed Respondent Laureano in a position where he could possibly have been the

person who stabbed William Travieso! In fact, several witnesses placed Laureano on the sidewalk behaving like a spectator at a boxing match.

Laureano was charged along with Bermudez and Bonilla in Bronx County Indictment 830/72 of "acting in concert" to commit intentional murder [New York Penal Law §125.25(1)], and of "acting in concert" to possess a weapon [former New York Penal Law §265.05 repealed, L. 1974, Ch 1041, eff. September 1, 1974, now at New York Penal Law §265.01]. The three defendants went to trial before the Honorable William Kapelman, J.S.C., and a jury. All were represented by a retained attorney, Stanley L. Siegel, Esq., of the law firm of Siegel, Graber, and Bourgeois.

The prosecution's theory was that each defendant was guilty of "acting in concert" to kill Travieso. No attempt was made to establish which person inflicted the fatal stab wound. Defense counsel presented a unified defense, making no attempt to distinguish degrees of intent and culpability among his clients. Essentially, counsel argued that because no one had seen the stabbing, anyone could have killed Travieso. It could have any member of his family or friends. Because of his obligation to his three jointly-represented clients, Laureano's counsel was neither able to cross-examine the witnesses against Laureano in a manner so as to clarify the sequence of events and the extent of participation by each of the co-defendants because questioning of this type would obviously redound to the disadvantage of the other defendants, nor could he argue that Laureano had engaged in an assault but had then withdrawn, unaware of the intentions of his co-defendants.

The jury returned a verdict of guilty of murder and possession of a weapon as to all three defendants. Each was sentenced to concurrent terms of 15 years to life imprisonment

for the charge of possesion of a weapon.

THE APPEALS

Laureano appealed from the judgment of conviction claiming that he had been denied effective assistance of counsel as a result of the joint representation of all three defendants. His conviction was affirmed by the Appellate Division of the New York State Supreme Court, First Department, 46 A.D.2d 1014 (1974), and leave to appeal to the New York State Court of Appeals was denied on January 22, 1975.

THE MAGISTRATE AND DISTRICT COURT

In his petition for a writ of habeas corpus filed in the United States District Court for the Southern District of New York in February 1978, Respondent Laureano presented his claim that he had been denied effective assistance of counsel at his criminal trial as a result of the multiple representation of the three co-defendants by one attorney. The petition was consolidated with that of Respondent Bermudez and referred to a Magistrate.

During the habeas proceedings, affidavits were submitted by the state court trial judge and by defense counsel Seigel, containing contradictory allegations as to whether an inquiry had been made by the trial court concerning multiple representation and the extent of such inquiry, if any. In his affidavit, defense counsel Seigel alleged that before trial in an off-the-record conference, he informed the judge that a conflict existed and requested that his clients have separate counsel. Mr. Seigel's affidavit went on to say that the trial judge replied that his request was a "stalling technique." The trial judge's affidavit stated that it was he who had raised the issue with defense counsel at an off-the-record con-

ference, and that Seigel had assured him that no conflict existed among the defenses of the three co-defendants. Based upon these affidavits, the Magistrate specifically concluded that the allegations of the trial judge, even if accepted, did not make out consent to joint representation. RA 17.

After issuance of the Magistrate's report, the trial judge submitted a second affidavit in which he remembered that defense counsel had given his assurance in open court in an off-the-record discussion in the presence of all three respondents, that no conflict existed.* The judge further stated in his second affidavit that he "believe[d] he questioned the three defendants directly and that they all agreed to the joint representation." The District Court considered the second affidavit of the trial judge, noting that it was filed "[s]omewhat suprisingly," after the issuance of the Magistrate's Report. In spite of this second affidavit, the District Court did not modify the Magistrate's conclusions. The District Court adopted the findings of the Magistrate and granted the writs holding that respondents had exhausted their state remedies and that they were prejudiced by the joint representation.

THE COURT OF APPEALS

The questions presented to the Court of Appeals for the Second Circuit by the State were whether State remedies had been exhausted and whether the Respondents had been prejudiced by the joint representation. On November 26, 1979, the

* Transcripts for all the pre-trial proceedings in People v. Jose Bonilla, Jose Laureano and Fernando Bermudez, obtained by Diana Budzanoski, attorney for Bonilla, and made part of the District Court record reveal only two off-the-record conversations at the bench during this pre-trial period. The defendants were not present at either bench conference.

Court of Appeals summarily affirmed the granting of the writ on the opinion of the District Court. The State next petitioned this Court for a writ of certiorari on the question of whether three defendants who have jointly retained one attorney to represent them in a criminal trial can consent to such joint representation in response to an inquiry by the trial judge, thereby waiving their right to subsequently challenge the joint representation as ineffective under the Sixth and Fourteenth Amendments to the United States Constitution. On May 27, 1980, this Court granted Respondents' motions for leave to proceed in forma pauperis as well as the petition for a writ of certiorari, vacated the judgment and remanded the case to the Second Circuit for further consideration in light of Cuyler v. Sullivan, 446 U.S. 335, Harris v. Bermudez, 446 U.S. 962 (1980).

Upon reconsideration, the United States Court of Appeals for the Second Circuit held that the findings of the District Court and the report and recommendation of the Magistrate complied with the standard enunciated in Cuyler, supra, and affirmed the order of the District Court granting the petition for habeas corpus.

REASONS FOR DENYING THE WRIT

The three questions presented by the State to this Court for resolution do not dispute the application of the Cuyler v. Sullivan, 446 U.S. 335 (1980), standard, followed by this Court in Wood v. Georgia, 49 U.S.L.W. 4218 (March 4, 1981), requiring a defendant to show that a actual, not possible conflict of interest adversely affected his lawyer's performance. Rather, this Court is asked to determine whether on the very particular facts of this case, Respondents could be held to have consented to the multiple representation, thereby waiving their right to argue on appeal that such multiple representation failed to provide them with the effective assistance of counsel mandated by the Sixth and Fourteenth Amendments to the United States Constitution.

At this point in the proceedings, the fact that multiple representation actually adversely affected the performance of Respondent Laureano's attorney cannot be seriously challenged. In effect, the State has conceded this issue by not raising it as a question to be addressed by this Court. It is, however, mentioned in Petitioners' brief and therefore must be addressed herein. Based upon the detailed findings set forth in the Magistrate's Report and Recommendation, the Second Circuit held "...[that] there existed an actual conflict of interest in the present case. The only available defense to the prosecution where all three defendants were represented by the same lawyer was that perhaps none of the three stabbed the victim's family. There was no possibility for one defendant to attempt to disassociate himself from the others. Such a defense was no defense at all." (Emphasis in original. See Appendix A, page 3a.) This observation is certainly not based upon judicial speculation, as asserted by Petitioners.

Further, in Cuyler, supra, and Wood, supra, this Court based its analysis of whether an actual conflict existed, in part, upon whether trial strategies helpful to one client existed which an attorney could not utilize because of joint representation. Thus, it is beyond dispute that a Sixth Amendment violation occurs if a trial strategy is available on behalf of one client but is not presented because of a conflict resulting from multiple representation.

William Travieso died of one stab wound; therefore, only one of the three defendants on trial could have been the actual killer. The State did not know which one. The State offered to let the defendants plead guilty on the following terms: two of the defendants would plead guilty and receive jail sentences of one year. The actual killer would plead guilty and receive a jail sentence with a maximum term of imprisonment for four years. The decision as to which defendant would receive a particular plea and sentence was left up to the individual to decide, but the State did insist that the plea be an "all or nothing" deal, either all three plead guilty or all three go to trial. See RA pp. 32-33.

In the absence of any positive identification as to who the actual killer was, with no knife having been recovered, lacking any post arrest confessions or admissions, and finding no bloodstains on the clothes of any of the defendants, there is every valid reason to believe that the State was prepared to bargain for the testimony of at least one or possibly two of the defendants against the actual killer. Obviously, joint counsel could never indulge in such plea bargaining or even suggest it to defendants without violating his professional responsibility to the remaining defendant(s). Colon v. Fogg, 603 F.2d 403, 408, n.5 (2nd Cir. 1979); Holloway v. Arkansas, 435 U.S. 475, 491 (1978).

As the District Court found, based upon the undisputed factual showing before it:

> [W]here the State lacked conclusive evidence as to which of the three defendants actually committed the stabbing, an independent lawyer might have worked out a special 'deal' for his client in exchange for an agreement to testify. See Appendix B, p. 11a.

During the course of the trial itself, the prosecution did not attempt to prove which of the defendants had inflicted the fatal wound, but proceeded under the theory that all three defendants were "acting in concert." The question to be answered by the jury, therefore, was whether each individual defendant had formed the intent to kill. See: People v. May, 9 A.D. 2d 508, 509-13 (1st Dept. 1960). In the face of the prosecution's burden of proof on the question of the murderous intent of each individual defendant and the substantially weaker evidence implicating Laureano in the murder, the District Court concluded that separate counsel might well have successfully dissociated a defendant from the murder and convinced a jury that a defendant lacked the intent required to convict. Additional examples of the actual conflict affecting Laureano's trial attorney are found in the Statement of the Case at p. 4 , supra. For the reasons stated in the preceeding paragraphs, it is clear that an actual, not speculative, conflict of interest existed which adversely affected Mr. Seigel's performance.

In a roundabout manner, Petitioners pose the question of whether Respondent Laureano consented to multiple representation, thereby waiving his right to argue on appeal that such representation failed to provide him with effective assistance of counsel mandated by the Sixth and Fourteenth Amendments to the United States Constitution. The correct standard to be applied here is whether Respondent waived his right to independent counsel, not whether or not Respondent

consented to such representation. Wood v. Georgia, 49 U.S.L.W. 4218, 4221 (March 4, 1981). The difference between consent and waiver is crucial.

The State's assertions notwithstanding, this Court has imposed a duty upon a trial court to inquire further when it knows,or reasonably should have known, that a possibility of a conflict exists. Cuyler, supra, at p. 1117, Wood, supra, at p. 4220. Assuming the affidavits of the trial judge to be true, such inquiry was held; however, even reading the trial judge's affidavits in their most favorable light, no case can be made out that Respondent Laureano waived his right to independent counsel. Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938).

In order to establish a waiver, it must be shown that the accused was told the nature of the conflict, the disabilities which the conflict may palce on the lawyers in the conduct of the defense, and the nature of the claims which may be waived if the choice is to proceed with one lawyer. United States v. Armedo-Sarmiento, 524 F.2d 591, 593 (2d. Cir. 1975). The client must be "fully aware of the nature of the conflict and understand the potential threat to the protection of his interests." In Re Taylor, 567 F. 2d 1183, 1191 (2d Cir. 1977). He must have full knowledge of the potential adverse consequences of joint representation. Taylor, supra.

The standard for waiver applied by the circuits other than the Second Circuit is similarly expressed and requires an exploration and explanation of the risks of joint representation so that the defendant understands that what is in one defendant's best interests may not be in the best interests of a co-defendant. United States v. Donahue, 560 F. 2d 1039, 1043-1044 (1st Cir. 1977); see also Gray v. Estelle, 616 F. 2d 801, 804 (5th Cir. 1980); United States v. Quinones,

613 F. 2d 47, 49 (3d Cir.), cert. denied, 446 U.S. 937 (1980); Zuck v. Alabama, 588 F.2d 436,440 (5th Cir.), cert. denied, 444 U.S. 833 (1979); United States v. Gaines, 529 F. 2d 1038, 1044 (7th Cir. 1976); United States v. Mandell, 525 F. 2d 671, 677 (7th Cir. 1975), cert. denied, 423 U.S. 1049 (1976).

Neither of the two affidavits of the trial judge, the contents of which are outlined in the Statement of the Case at pp 5-6 supra, if taken as truth, indicates that an inquiry was made which was sufficiently thorough as to support a conclusion that Respondent Laureano waived his right to independent counsel. Neither affidavit indicates that Respondent was informed and understood the nature of the conflict, the threat of the conflict to the protection of his interests, the potential adverse consequences of joint representation, or that what was in his best interests was not in the best interests of his co-defendant. At best, the affidavits merely indicate the possibility of an unknowing and uninformed consent.

Respondents here ask this Court to determine whether a federal court, in the interest of comity, must afford the State court the opportunity to hold a fact-finding hearing to determine whether jointly represented criminal defendants consented to multiple representation.* This issue was specifically addressed by the District Court which held that to return this matter to the State court would be an exercise in futility. "The concept of futility must be interpreted to encompass notions of economy and fairness. Thus unless new material creates at least a moderate likelihood of a dif-

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* Petitioners apparently framed this question in mistaken reliance on Kaplan v. Bombard, 573 F.2d 708, 714 (2d Cir. 1978) in which that court held that the decision to be jointly represented was one of consent not waiver, "...a decision to assert one's constitutional right instead of another." This Court has recently adopted the waiver standard. Wood, supra, at p. 4221.

ferent result, it is futile to send an action back to the state courts." Appendix B, page 9a. See also: Fay v. Noia, 372 U.S. 391, 420 (1963).

It is clearly unlikely that in this stage of the proceedings, the state courts would reach a different result on the question of consent. Respondent expressly denies ever hearing discussion of a conflict of interest. Defense counsel Seigel denies that such discussion ever occurred. The District Attorney handling the matter, in an affidavit submitted to the District Court, makes no reference to any discussion in open court. Petitioners have conceded this issue by failing to raise it both in their prior application to this Court and in the Court of Appeals for the Second Circuit. The State must therefore be deemed to have waived this issue at this stage of the proceedings.

This case is clearly distinguishible from Sumner v. Mata, U.S. , 101 S. Ct. 764 (1981); Wainwright v. Sykes, 433 U.S. 72 (1977); and Stone v. Powell, 428 U.S. 465 (1976) on its facts as well as its legal posture. In Sumner, supra., Wainwright, supra., and Stone, supra., this Court barred habeas corpus relief where the issue raised in the federal court was never raised on direct appeal to the State courts. Respondent Laureano raised the issue of conflict of interest in his state court appeal. This appeal was denied. Furthermore, he could not challenge the judgment of conviction in a collateral proceeding in the state court because under the New York Criminal Procedure Law §440.10(2)(a) (McKinney, 1979), the court must deny a motion to vacate a judgment when the "ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment."

Petitioners' claim that the District Court and the Court of Appeals completely disregarded the trial judge's affidavits in which Respondents are alleged to have consented to proceed with their retained counsel is incorrect. The Magistrate considered the question of consent at length, examined the allegations supporting a finding of consent, and concluded that Laureano did not consent. The District Court adopted the Magistrate's recommendations, and in its decision referred to the trial judge's second affidavit which was submitted after the Magistrate's Report and Recommendation. (8a-9a, 11a, n.2). Obviously, either the District Court disbelieved the trial judge's allegations or determined that his affidavit did not alter the finding of lack of consent.

In conclusion, for the reasons stated above, Respondent Laureano submits that this case is not appropriate for review on writ of certiorari and the writ should not be granted.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted

Ruth Cassell

Ruth Cassell
David Leven

Attorneys for Respondent
Laureano

Dated: New York, New York
May 1980

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IN THE SUPREME COURT OF THE UNITED STATES

October ~~Term~~, 1981

No. #80-1806

DAVID R. HARRIS, Superintendent, Greenhaven Correctional Facility, ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Petitioners,

-against-

FERNANDO BERMUDEZ, JOSE LAUREANO and JOSE BONILLA,

Respondents.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The respondent, Jose Laureano, hereby moves this Honorable Court pursuant to Rule 53 for an order permitting him to file his Response to the Petition for a Writ of Certiorari and otherwise proceed in the Court in forma pauperis. In support of his motion, respondent relies upon his annexed Affidavit, sworn on May 14, 1981.

Dated: New York, New York
May 15, 1981

RUTH CASSELL
DAVID C. LEVEN
Prisoners' Legal Services of New York
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(212) 285-0370

IN THE SUPREME COURT OF THE UNITED STATES

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-against-

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Respondents.

AFFIDAVIT IN SUPPORT OF MOTION OF JOSE LAUREANO TO PROCEED IN THE SUPREME COURT OF THE UNITED STATES IN FORMA PAUPERIS

I, JOSE LAUREANO, being first duly sworn, on oath, depose and say that I am respondent in the above-entitled cause; that in support of my motion to proceed in opposition to the petition for a writ of certiorari and in any further proceedings in this Court without being required to pay fees or to submit printed briefs, I state that because of my poverty I am unable to pay costs of said proceeding or give security therefor; that I believe I am entitled to redress; and that the position which I desire to present in opposition to the petition for a writ of certiorari is the following:

Certiorari should not be granted to review the order of the United States Court of Appeals for the Second Circuit upon remand for reconsideration in light of Cuyler v. Sullivan, 446 U.S. 335 (1980), Harris v. Bermudez, 446 U.S. 962 (1980). Said order of the Court of Appeals for the Second Circuit affirmed the District Court's decision and held that such decision complied with the standard articulated by this Court in Cuyler, supra, for determining Sixth Amendment cases in which an assertion is made by a

criminal defendant that he was deprived of effective assistance of counsel arising from multiple representation.

The order of the Court of Appeals for the Second Circuit is not in conflict with the decision of any other court of appeals.

I further swear that the response which I have made to the questions and instructions below, relating to my ability to pay the costs of responding to the petition for a writ of certiorari or the costs of any further or other proceedings in this Court are true.

1. Are you presently employed? Yes

If yes, where are you working? Public Fuel Heat Services, 357 East 116th Street, New York, New York

When do you begin working? Began working October, 1980

What is your weekly salary? $163.00 net salary

2. Have you received within the past twelve months any income fron a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? No

3. Do you own any cash or checking or savings account? No

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property, excluding ordinary household furnishings and clothing? No

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

6. Prisoners' Legal Services has been representing me in this matter since its inception and is fully familiar with the facts, issues, and legal history. It would be impossible for me to secure other representation at this time.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

José Laureano

JOSE LAUREANO

Subscribed and sworn to before me this
14 day of May, 1981

Ruth Cassell

NOTARY PUBLIC

RUTH CASSELL
Notary Public, State of New York
No. 31-4607156
Qualified in New York County
Commission Expires March 30, 1983